UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRSTENERGY GENERATION CORP.

And Case 6-CA-36631

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 272, AFL-CIO

CHARGING PARTY'S LIMITED EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Charging Party International Brotherhood of Electrical Workers, Local Union 272, AFL-CIO ("Union") through its attorneys, Gilardi Oliver & Lomupo, and Marianne Oliver, files these limited exceptions to the remedial portion of the Administrative Law Judge's opinion in this matter, pursuant to subsection 102.46 of the Board's Rules and Regulations, as follows:

EXCEPTION 1 - The Administrative Law Judge ("ALJ") erred when he ordered in his Remedy that the Union must demand bargaining regarding a cap on the employer subsidy to retiree health care.

(i) Question to Which Exception it Taken: The question of procedure and law at issue here involves whether, in the face of a yet unremedied unilateral change in future retiree health care employer subsidies, and an execution of a labor agreement covering the subject at issue, the Union must demand bargaining and if it does not, risk a waiver of the right to bargain.

(ii) Part of the ALJ Decision to Which Objection is Made: Page 18 of the ALJ's decision provides as follows:

"The Respondent shall, *upon demand by Local 272*, bargain in good faith with Local 272 regarding a cap on the employer subsidy to retiree health care, as it applies to current employees and to former employees who retired on or after July 1, 2009." (Emphasis supplied).

(iii) Citation to Portions of Record Relied Upon: Joint Exhibit 1, Stipulations of Fact.

(iv) Grounds for the Exception: The Union's narrow exception here relates to the ALJ's order that the Union demand bargaining now, after a labor contract is now in place setting forth future retiree benefits and before the Respondent has even complied with its remedial obligations set forth in the ALJ's decision. The ALJ correctly found that FirstEnergy unilaterally implemented a three year health insurance subsidy cap on future retirees (ALJ Decision, p. 13, lines 25-30). He also correctly found that that the three year cap on employer contributions to future retiree health care was presented as a fait accompli (Decision, p. 20, lines 40-50), and that FirstEnergy's refusal to bargain about the issue as a part of then-ongoing negotiations for a successor labor agreement was unlawful (Decision, p. 11, lines 1-5). Most notably, he correctly concluded that the statutory duty to bargain is not fulfilled by an offer to discuss a mandatory subject of bargaining *after* a collective-bargaining agreement has already been executed and the Union has lost its leverage provided by the right to strike (Decision, p. 10, lines 5-20), citing *E.I. DuPont de Nemours & Co.*, 304 NLRB 792, n.1 (1991).

As set forth in Joint Exhibit 1, Stipulations of Fact, the parties now have a collective bargaining agreement which extends through February 15, 2013. That contract describes what contributions an employer will make to future retiree health care coverage (Joint Exhibit 1, page 2, point 5).

Section 8(d) of the Act provides in pertinent part that the "duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract of a fixed term, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U.S.C. §158(d). In line with that provision, the Board has long held that a party does not violate its bargaining obligation when it refuses to discuss changes proposed by the other party in the terms of an existing contract. *C&S Industries, Inc.,* 158 NLRB 454 (1966).

Neither the Counsel for the General Counsel nor the Union argued in their briefs before the ALJ that bargaining was required here; to the contrary, both Counsel for the General Counsel and the Union argued that the Respondent should rescind the unilateral change, restore the status quo ante, expunge reference to the unilateral change in the VERO [early retirement] documents entered into by employees; and make whole any affected unit employees with appropriate interest for any benefits suffered as a result of Respondent's unfair labor practices (Counsel for the General Counsel brief at page 30; Union brief at p. 9).

The ALJ ordered the above-requested remedies, but also ordered the Respondent to bargain the matter upon the union's demand. The Union does not want to be in the unenviable position of disregarding the judge's order and failing to request bargaining and thus risking a waiver of its right to bargain[1]; however, the Union respectfully

[1] When an employer announces plans for a change in noncontractual working conditions, a union having sufficient notice of the contemplated change will ordinarily be deemed to have waived its bargaining rights if it fails to request bargaining prior to implementation. *W-I Forest Products Company*, 304 NLRB 957 (1991). It is incumbent on the union to act with due diligence in requesting bargaining. *Kansas Education Ass'n.*, 275 NLRB 638 (1991).

submits that no bargaining need now occur because the matter is covered by the contract. The ALJ's perhaps inadvertent reference to the Respondent's general obligation to bargain upon demand by Local 272 does not clarify that no such obligation concerning this matter is now required in light of the execution of the collective bargaining agreement. It is respectfully submitted that the ALJ's order be clarified to delete the reference on page 18 that the "Respondent shall, upon demand by Local 272, bargain in good faith with Local 272 regarding a cap on the employer subsidy to retiree health care, as it applies to current employees and to former employees who retired on or after July 1, 2009."

In *C&S, Inc., supra*, the Board clarified an ALJ's opinion where following a unilateral change in contract terms, the ALJ ordered that part of the remedy required that "upon request, [the Employer shall] meet and bargain collectively with the above-named labor organization . . and if an understanding is reached, embody such understanding in a signed agreement." *C&S* at 466, ALJ's Recommended Order at 2(a). The Board, in concluding that no such bargaining was necessary because the contract covered the issue and therefore the union had no obligation to bargain, corrected the Order to delete the reference to an obligation to bargain the issue. *C&S* at 461, deleting section 2a of the ALJ's Recommended Order requiring that the matter be bargained. As the Board in *C&S* clearly explained, Section 8d of the Act privileges a party to refuse to discuss changes proposed by the other party in the terms of an existing contract. Id., at 457. The ALJ's order in *C&S* was therefore modified to delete the reference in 2a of the ALJ's order requiring bargaining of the matter upon request. *Id.* at 460-461.

In short, FirstEnergy had its opportunity to raise the issue in bargaining for the 2009 contract, and its failure to do so and execution of a contract embodying future retiree medical terms forecloses FirstEnergy from now proposing future retiree insurance caps anew and requiring the Union to request bargaining regarding same. It is respectfully submitted that the above-cited reference in the ALJ's order at page 18 requiring bargaining upon demand by the union be deleted.

Respectfully submitted,

Marianne Oliver
Gilardi Oliver & Lomupo P.A.
223 Fourth Avenue, 10th Floor
Pittsburgh PA 15222
412-391-9770
412-232-3084 (fax)
moliver@lawgol.com

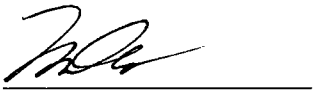
Counsel for the Charging Party Union

CERTIFICATE OF SERVICE

I, Marianne Oliver, certify that I served the within Charging Party's Limited Exceptions to the Administrative Law Judge's Decision upon the following parties, this 14th day of October, 2010, by first class mail:

Janice Sauchin, Esquire
National Labor Relations Board
1501 Federal Building
1000 Liberty Avenue
Pittsburgh PA 15222

James Prozzi, Esquire
Jackson Lewis
One PPG Place 28th Floor
Pittsburgh PA 15222



Marianne Oliver

October 14, 2010

RECEIVED

2010 OCT 15 PM 2:09

NLRB
ORDER SECTION